IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33687

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 542**
	)	
Plaintiff-Respondent,	)	**Filed: July 9, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
TODD A. SAWYER,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Charles W. Hosack, District Judge.

Judgment of conviction for felony driving under the influence, affirmed; order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Todd A. Sawyer appeals from his judgment of conviction for felony driving under the influence. Sawyer complains of prosecutorial misconduct and also argues that the district court abused its discretion both in sentencing and by denying Sawyer's I.C.R. 35 motion for reduction of sentence. We affirm.

I.
BACKGROUND

On February 23, 2006, Sawyer entered a store where he counted out change to pay for gas. An employee at the store noticed that Sawyer smelled "overwhelmingly" of alcohol, had difficulty counting the change, was hard to understand, and staggered as he left the store. A police officer was also in the store. The employee told the officer that a man just left the store and she thought he was intoxicated.

The officer made contact with Sawyer at the gas pump where he was refueling. Sawyer told the officer that he had driven to the gas station. The officer then drove her patrol car behind Sawyer's vehicle so that she could videotape the exchange. The officer also smelled alcohol on Sawyers breath, and noticed that his eyes were red and watery. The officer then administered several field sobriety tests including a horizontal gaze nystagmus test, having Sawyer recite the alphabet, and having Sawyer count from seventy-five to ninety and then ninety back to seventy-five. The horizontal gaze nystagmus test indicated that Sawyer was under the influence of alcohol, and Sawyer could not or had great difficulty performing the remaining exercises. The officer asked Sawyer if he thought that alcohol was impairing his ability to think and he responded, "Probably not very good." Sawyer was charged with felony driving under the influence (DUI). I.C. § 18-8004. No breath alcohol concentration test was performed, as Sawyer refused.

At trial, the jury heard testimony from the store employee and the officer. Additionally, the passenger in Sawyer's vehicle testified that he had seen Sawyer drinking earlier in the day. The jury viewed the police video of Sawyer's contact with the officer. During rebuttal closing argument, the prosecutor asked the jury whether it would "feel comfortable riding in a vehicle that this man was driving that day or somebody in your family?" Defense counsel objected, stating that the argument was "improper" and "highly inappropriate." The district court overruled the objection.

The jury found Sawyer guilty.[1] The district court sentenced Sawyer to a unified term of eleven and one-half years, with a minimum period of confinement of one and one-half years. Sawyer filed an I.C.R. 35 motion for reduction of sentence, which the district court denied. Sawyer appeals.

II.
ANALYSIS

A. Prosecutorial Misconduct

Sawyer argues that his right to a fair trial was violated when the prosecutor appealed to the emotion and passions of the jury members during rebuttal closing argument by asking them if

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[1] Sawyer was also found guilty of possession of an open container. However, he does not challenge this conviction or sentence on appeal.

they would "feel comfortable riding in a vehicle that this man was driving that day or somebody in your family?" Sawyer contends that the prosecutor's statement was improper and, therefore, this court should vacate his conviction.

Where defense counsel objects at trial to acts of alleged prosecutorial misconduct, we first determine whether there was error. *United States v. Weatherspoon*, 410 F.3d 1142, 1150 (9th Cir. 2005); *State v. Phillips*, 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct. App. 2007). If we conclude that it was error, we then consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless. *State v. Romero-Garcia*, 139 Idaho 199, 202, 75 P.3d 1209, 1212 (Ct. App. 2003); *State v. Reynolds*, 120 Idaho 445, 448, 816 P.3d 1002, 1005 (Ct. App. 1991). Where the appellate court is able to declare that, beyond a reasonable doubt, the jury below would have reached the same result had the misconduct not occurred, the error is deemed harmless. *Romero-Garcia*, 139 Idaho at 202, 75 P.3d at 1212; *Reynolds*, 120 Idaho at 451, 816 P.2d at 1008.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Timmons*, 145 Idaho 279, 288, 178 P.3d 644, 653 (Ct. App. 2007). Its purpose is to enlighten the jury and to help jurors remember and interpret the evidence. *Id.*; *Reynolds*, 120 Idaho at 450, 816 P.2d at 1007. Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003).

When a prosecutor refers to the jurors' families and hypothesizes the commission of a crime against them, the statement is improper. *State v. Pecor*, 132 Idaho 359, 367, 972 P.2d 737, 745 (Ct. App. 1998). In *Pecor*, the defendant was convicted of delivery of a controlled substance. At trial, the prosecutor told the jury members, "[Pecor] is the dealer, he is the dealer to your sons and to your daughters." *Id.* This Court found the statement improper, as it appealed to the jurors' fears and was not a "fact" or reasonable inference based on the evidence. *Id.*

Appeals to the jurors' emotion during closing argument are also improper. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. In *Phillips*, the prosecutor suggested that the jurors might feel irritated and upset by the testimony of the defendant's girlfriend and brother. This Court held that the statements were improper appeals to the jury's passion or prejudice. *Id.*

In this case, we need not determine whether the prosecutor's comment rises to the level of misconduct. Even if we were to assume, without deciding, that the comment was improper, any resulting error must be deemed harmless.

As stated previously, an error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that the result of the trial would have been the same if the misconduct had not occurred. *Romero-Garcia*, 139 Idaho at 202, 75 P.3d at 1212; *Reynolds*, 120 Idaho at 451, 816 P.3d at 1008. An important factor in evaluating the prejudicial effect of improper statements is the strength of the case against a defendant. *Weatherspoon*, 410 F.3d at 1151.

> When the case is particularly strong, the likelihood that prosecutorial misconduct will affect the defendant's substantial rights is lessened because the jury's deliberations are less apt to be influenced. But as the case becomes progressively weaker, the possibility of prejudicial effect grows correspondingly.

Id.

In *Phillips*, this Court was unable to say beyond a reasonable doubt that the result would have been the same had the misconduct not occurred. *Phillips*, 144 Idaho at 86, 156 P.3d at 590. In that case, however, the prosecutor invited the jury to be irritated and upset by the testimony for the defense six times during closing argument. Furthermore, that case hinged largely on the credibility of the testimony of those individuals. In *Pecor*, however, this Court found that the prosecutor's statement that the defendant was a drug dealer to the jury members' daughters and sons was harmless error. *Pecor*, 132 Idaho at 367-68, 972 P.2d at 745-46. The Court arrived at this conclusion based upon the evidence, which included testimony from four individuals stating that the defendant had delivered methamphetamine or had admitted to his involvement in the delivery. *Id.* 132 Idaho at 367, 972 P.2d at 745.

In this case, due to the overwhelming evidence proving Sawyer's guilt, we are persuaded, beyond a reasonable doubt, that the jury would have reached the same conclusion had the prosecutorial misconduct not occurred. The jury heard testimony from the store employee that Sawyer smelled overwhelmingly of alcohol, had difficulty counting change, and staggered out to his car. The jury heard the testimony of the officer that Sawyer smelled of alcohol, had red eyes, and failed field sobriety evaluations. The jury also heard testimony from the passenger in Sawyer's car that he saw Sawyer drinking earlier in the day. In addition to these witnesses, the jury also watched the police video which documented Sawyer's slurred speech and failure of the field sobriety evaluations. Accordingly, there is ample evidence which supports the jury's

determination that Sawyer was guilty. Therefore, we are persuaded, beyond a reasonable doubt, that the jury would have reached the same conclusion had the misconduct not occurred. The error, therefore, was harmless.

B. Sentence Review

Sawyer next contends that his sentence of a unified term of eleven and one-half years, with a minimum period of confinement of one and one-half years, is excessive. An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

The presentence investigation report shows that Sawyer is a persistent offender. Prior to the conviction at issue, Sawyer had been found guilty at least ten times of driving under the influence, two of those convictions being felonies. Additionally, Sawyer has not done well on probation or parole. The offense for which Sawyer was convicted, DUI, is extremely serious inasmuch as the lives and safety of innocent persons are placed at risk. Although Sawyer may be of good character when sober, the record establishes that he is an alcoholic who cannot resist driving while intoxicated. Having reviewed the record, it is clear that the district court did not abuse its discretion when it sentenced Sawyer.

C. Rule 35 Motion

Sawyer also contends that the district court abused its discretion when it denied his Rule 35 motion for reduction of sentence. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1997); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984).

As stated previously, Sawyer is a persistent offender who has not responded well to probation or parole. For the same reasons we affirm the sentence imposed upon Sawyer, we also affirm the district court's denial of Sawyer's Rule 35 motion.

III.

CONCLUSION

Because the prosecutorial misconduct that occurred during Sawyer's trial did not affect the outcome of his case, we reject Sawyer's argument that his conviction must be vacated due to this error. Further, Sawyer has failed to show that his sentence is excessive or that the district court erred in denying his Rule 35 motion. Accordingly, Sawyer's judgment of conviction and unified sentence of eleven and one-half years, with a minimum period of confinement of one and one-half years, and the district court's order denying Sawyer's Rule 35 motion are affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**